

In many instances, a competitive carrier will be able to access tenants in a building only through use of the incumbent utilities' rights-of-way. It is therefore imperative that the Commission establish clear and enforceable rules governing access to rights-of-way within buildings and on building rooftops.

V. CONCLUSION

For the foregoing reasons, Teligent respectfully requests that the Commission reconsider its Report and Order in this docket and prescribe rules and more specific guidance concerning utilities' provision of nondiscriminatory access to rights-of-way, including those within and on top of buildings, at rates and terms that are just and reasonable.


Respectfully submitted,

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I, Gunnar D. Halley, do hereby certify that on this 13th day of April, 1998, copies of the foregoing "Petition for Reconsideration and Clarification of Teligent, Inc." were delivered by hand to the following parties:

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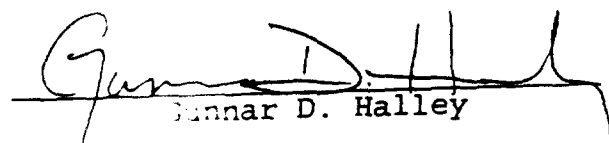
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BEFORE THE
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WASHINGTON, D.C.

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MAY 22 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 703(e))
of the Telecommunications Act)
of 1996)
)
Amendment of the Commission's)
Rules and Policies Governing)
Pole Attachments)

CS Docket No. 97-151

**REPLY TO OPPOSITIONS TO THE
PETITION FOR RECONSIDERATION AND CLARIFICATION
OF TELIGENT, INC.**

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May 22, 1998

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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of the Telecommunications Act)
of 1996)
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CS Docket No. 97-151

**REPLY TO OPPOSITIONS TO THE
PETITION FOR RECONSIDERATION AND CLARIFICATION
OF TELIGENT, INC.**

I. INTRODUCTION AND SUMMARY

Only monopolist electric utilities and incumbent local exchange carriers opposed Teligent's Petition. The line-up of opposition to right-of-way access in this proceeding demonstrates starkly that the monopolists strongly resist sharing the valuable privileges and benefits of incumbency and, instead, seek to perpetuate the advantages that they secured solely by virtue of their monopoly status.¹ Section 224 was designed to level this legacy of monopoly by opening rights-of-way and providing access to other essential facilities for companies trying to compete with the incumbent monopolists.

¹ Refusing to concede the benefits of telecommunications competition, SBC goes so far as to claim no "legitimate federal purpose" in allowing wireless carriers the Section 224 access rights of telecommunications carriers. SBC Comments at 17.

Section 224 applies wherever the utilities' rights-of-way exist. These rights-of-way were granted or created initially for the purpose of enhancing public welfare; to claim now some private and exclusive right and interest in them not only contravenes their historic purpose, but also turns a provision that is pro-competitive-- Section 224 -- into one that is woefully inadequate. Utility monopolists that have gained rights-of-way by virtue of their monopolies have a statutory obligation to grant access to those rights-of-way -- whether they exist on public or private property -- so that the public welfare is further enhanced by the availability of alternatives in the provision of telecommunications service.

II. THE COMMISSION HAS NOT DECIDED THE ISSUES RAISED IN TELIGENT'S PETITION.

Several parties mention the Commission's consideration in the Interconnection Order² of access to the rooftops of utility corporate offices under Section 224.³ They point to this as evidence that the Commission has already decided the issues raised in Teligent's Petition.⁴ The Edison Electric Institute/UTC claims that "Teligent raises no new substantive arguments as to why access should be afforded to utility rooftops."⁵

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("Interconnection Order").

³ Id. at ¶ 1185.

⁴ Sprint Corporation Comments at 2 (citing the Interconnection Order and recommending that "Teligent's arguments on this point should be summarily dismissed.").

⁵ EEI/UTC Comments at 17.

These comments represent a serious misunderstanding of Teligent's request which bears clarification so that the Commission does not similarly misinterpret Teligent's Petition. Teligent does not seek access to the roofs of utility corporate offices qua corporate offices. Consistent with the Interconnection Order, Teligent seeks access to utilities' distribution facilities; it merely requests express clarification from the Commission that where utilities have rights-of-way within or on top of buildings -- that is, the right to use or access space for purposes of providing utility service -- such rights-of-way are subject to the access requirements of Section 224. The Commission did not resolve this issue in the Interconnection Order.

III. UTILITIES HAVE THE AUTHORITY AND OBLIGATION TO GRANT ACCESS TO PRIVATE RIGHTS-OF-WAY.

Several parties claim that utilities lack authority to grant telecommunications carriers access to their rights-of-way over the property of third parties or to otherwise expand easements to accommodate requests for access. For example, GTE erroneously states that the access sought by Teligent's Petition would materially burden the underlying property and would therefore preclude access to the easement by other telecommunications carriers.⁶ Consistently, state courts have found that granting

⁶ GTE Comments at 4. The utilities' plain disregard for the authority of federal law -- Section 224, specifically -- is astonishing and unfortunately typical of the monopolists' response to Congress' attempts to provide for competition. For example, despite the mandate of Section 224, GTE claims that many of its rights-of-way are "non-assignable." Id. The Edison

third party access to private easements in a manner similar to that proposed by Teligent is not sufficiently burdensome to be impermissible under an original utility easement.⁷ The utilities' claims to the contrary are particularly disingenuous in light of their use of their own rights-of-way for non-core service offerings. For example, some electric companies are leveraging their monopoly status by providing telecommunications services using their existing rights-of-way. Indeed, today's Washington Post discusses PEPCO's provision of local telephone service to the District of Columbia and notes that

power companies . . . own power-line rights of way reaching into virtually every corner of urban America. Along them they are laying

Electric Institute/UTC assert that "[e]lectric utilities do not have the authority to convey access to private building rooftops owned by third parties, and nothing in Section 224 alters this fact." EEI/UTC Comments at 18 (emphasis added). If, as EEI/UTC suggest, Section 224 does not grant access to utility rights-of-way, substantial portions of that provision would be rendered meaningless.

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See, e.g., Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 803 (1985) ("We fail to see how the addition of cable equipment to a preexisting utility pole materially increased the burden on appellants' property."); see also Shaffer v. Video Display Corp., 539 N.E.2d 170, 173 (Ohio 1988) ("We do not believe the installation of a television cable three-fourths of an inch in diameter, buried thirty inches below the land's surface, is an additional or substantial burden on appellees' property."); see also White v. City of Ann Arbor, 281 N.W.2d 283 (Mich. 1979); Shadow West Apartments v. Florida, 498 So.2d 589 (Fla. 1986); Consolidated Television Serv., Inc. v. Leary, 382 S.W.2d 78 (Ky. 1964). Indeed, the Ninth Circuit has held that "compliance with mandatory federal programs imposing legal obligations on [the utility] is 'reasonably necessary' to the installation of [additional facilities within the easement]." Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 9 F.3d 1394, 1396 (9th Cir. 1993).

more fiber-optic cable to fill gaps in their communications network.⁸

The Commission should ignore as an anticompetitive contrivance the utilities' claims that they often cannot grant third-party access to their private rights-of-way.

IV. THE COMMISSION SHOULD PRESCRIBE RULES WHICH EXPRESSLY PROVIDE FOR ACCESS TO UTILITY RIGHTS-OF-WAY WITHIN AND ON TOP OF BUILDINGS.

The statute clearly requires nondiscriminatory access to utilities' rights-of-way at just and reasonable rates, terms, and conditions.⁹ Unless the Commission gives full effect to Section 224, many Americans who live and work in buildings may find

⁸ Martha M. Hamilton, "The Power To Link Masses?" The Washington Post, May 22, 1998 at D4; see also Martha M. Hamilton and Mike Mills, "PEPCO Plans Phone, Web, Cable Service," The Washington Post, Aug. 6, 1997, at A12 (In reporting on the PEPCO/RCN venture to offer telephony and video services in the District of Columbia, the article notes that "PEPCO's more important contribution to the venture is its vast network of access to the region's homes and businesses through the rights of way it owns to provide electrical power." The incumbent advantage of not encountering right-of-way entry barriers is reflected by a Bell Atlantic vice president's comment: "They've already got rights of way and conduits. They certainly have the skills and the work force to pull more fiber in, just like they could pull in electrical wires."). Last year, two utilities announced their intention to join forces with AT&T to offer a combination of utility and telecommunications services. Benjamin A. Holden, "UtiliCorp and Peco, Aided by AT&T, To Launch One-Stop Utility Service," Wall St. J., June 24, 1997, at A3. The Commission's rules contemplate the conduction of radio signals through public utility A/C power lines for transmission to AM radio receivers. 47 C.F.R. § 68.15.207 (establishing electric utility conduction limits). Moreover, the Wall Street Journal reported on technological advances by United Utilities and Northern Telecom which may permit the provision of telephone service and Internet access service over the power lines that bring electricity to homes and businesses. Gautum Naik, "Electric Outlets Could Be Link To the Internet," Wall St. J., Oct. 7, 1997, at B6.

⁹ 47 U.S.C. § 224(e)(1).

themselves without a choice of telecommunications carriers or without the lower cost service and range of offerings contemplated by telecommunications competition. Indeed, Chairman Kennard recently noted that "some wireless providers are gearing up to compete against wireline providers. We should explore every available opportunity to promote that competition."¹⁰ The Commission may realize one such opportunity by confirming that utility rights-of-way within and on top of buildings are subject to the just, reasonable and nondiscriminatory access requirements of Section 224.

¹⁰ Third Annual Commercial Mobile Radio Services Competition Report, Separate Statement of Chairman William E. Kennard, May 14, 1998.


V. CONCLUSION

For the foregoing reasons, Teligent respectfully requests that the Commission reject the Oppositions to its Petition for Reconsideration and Clarification and prescribe rules and more specific guidance concerning utilities' provision of nondiscriminatory access to rights-of-way, including those within and on top of buildings, at rates and terms that are just and reasonable.

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